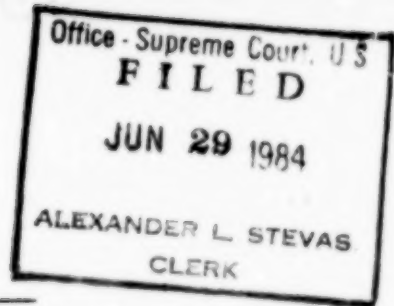


88-2161



No. 83-\_\_\_\_\_

In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1983

STATE OF MONTANA, et al.,  
Petitioners,

vs.

BLACKFEET TRIBE OF INDIANS,  
Respondent.

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is the provision of the 1924 Indian Mineral Leasing Act, 25 U.S.C. § 398 (1976), authorizing state taxation of oil and gas production on tribal lands applicable to leases made after the enactment of the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g (1976)?

PARTIES TO THE PROCEEDING

The petitioners, all parties to the proceeding in the Ninth Circuit Court of Appeals, are: the State of Montana, the Director of the Montana Department of Revenue, Glacier County and Pondera County, Montana. The respondent is the Blackfeet Tribe of Indians.

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BLACKFEET TRIBE OF INDIANS,  
Respondent.

\_\_\_\_\_  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

\_\_\_\_\_  
Petitioners,<sup>1</sup> the State of Montana,  
the Director of the Montana Department of  
Revenue, and Glacier and Pondera  
Counties, respectfully pray that a writ  
of certiorari issue to review the  
judgment and opinion of the United States

\_\_\_\_\_  
1 The petitioners are collectively  
called "the State." Statements  
pertaining only to the petitioner  
counties are noted.

Court of Appeals for the Ninth Circuit entered in this proceeding on April 3, 1984.

#### OPINIONS BELOW

A three-judge panel of the Ninth Circuit Court of Appeals issued its original opinion on December 14, 1982. That unreported opinion is reproduced in the Appendix to this petition (App. 70). On June 22, 1983, the Ninth Circuit ordered that the case be reheard en banc. 709 F.2d 521. The en banc panel issued its opinion on April 3, 1984. That opinion is reported at 729 F.2d 1192 (9th Cir. 1984), and appears at App. 1. In this petition, all references to the opinion of the Ninth Circuit Court of Appeals are to this April 3, 1984, opinion. The opinion of the United States District Court for the District of

Montana, issued by Judge Hatfield, 507 F. Supp. 446 (D. Mont. 1981), appears at App. 103.

#### JURISDICTION

The opinion of the en banc panel of the Court of Appeals for the Ninth Circuit was entered on April 3, 1984, and this petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. § 1254(1).

#### STATUTES AND TREATIES INVOLVED

##### 1. Federal Statutes.

The Act of February 28, 1891, 26 Stat. 795, codified at 25 U.S.C. § 397 (App. 150).

The Act of June 30, 1919, 41 Stat. 3, 16, & 17, which provides in pertinent part as follows:

....the Secretary of the Interior is authorized to make allotments under existing laws within the said [Blackfeet] Reservation to any Indians of said Blackfeet Tribe not heretofore allotted....

Provided further, That any and all minerals, including coal, oil, and gas, are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly: Provided, That the lands containing said minerals may be leased under such terms and conditions as the Secretary of the Interior may prescribe.

The Act of May 29, 1924, 43 Stat. 244, codified at 25 U.S.C. § 398 (App. 152), which provides in pertinent part:

Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands:

Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

The Indian Reorganization Act of June 18, 1934, 48 Stat. 984, codified as amended at 25 U.S.C. §§ 461-479 (App. 154).

The Act of May 11, 1938, 52 Stat. 347, codified as amended at 25 U.S.C. §§ 396a-396g (App. 175). Section 7 of that Act provides that "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed."

## 2. State Statutes.

MONTANA CODE ANNOTATED [hereinafter MCA]:

Oil and Gas Net Proceeds Tax, § 15-23-601, -603, -605, -607, -608, MCA (App. 181).

Oil and Gas Severance Tax,  
 §§ 15-36-101, -103, -105, MCA (App. 195).

Resource Indemnity Trust Tax  
 §§ 15-38-103, -106, -108, MCA (App. 206).

Oil and Gas Conservation Tax,  
 §§ 82-11-101 (in pertinent part), -131,  
 -132, MCA (App. 215).

REVISED CODES OF MONTANA, 1947  
 [hereinafter R.C.M. 1947]:

Oil or Gas Producers' Severance Tax  
 §§ 84-2202, -2204, -2205 and -2209.1,  
 R.C.M. 1947 (the predecessors to  
 §§ 15-36-101, -103 and -105, MCA) (App.  
 222).

#### STATEMENT OF THE CASE

The Blackfeet Tribe of Indians filed the complaint in this case in 1978. The complaint challenged taxation of the Tribe's royalty interests in oil and gas

produced on the Blackfeet Indian Reservation, Montana.<sup>2</sup> The Blackfeet Tribe is the lessor of 125 parcels of tribal land for oil and gas mining purposes. All of the challenged taxes are paid by non-Indian lessees.<sup>3</sup> The

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2 Four taxes are at issue: (1) the Oil and Gas Conservation Tax, § 82-11-131, MCA (formerly § 60-145, R.C.M. 1947) (App. 215); (2) the Resource Indemnity Trust Tax, § 15-38-104, MCA (formerly § 84-7006, R.C.M. 1947) (App. 206); (3) the Oil and Gas Severance Tax, § 15-36-101, MCA (App. 195); (4) the Oil and Gas Net Proceeds Tax, § 15-23-601, et seq. MCA (formerly §§ 84-7201, et seq., R.C.M. 1947) (App. 181). The State of Montana through the Montana Department of Revenue collects all taxes except the Oil and Gas Net Proceeds Tax. Although reported to the Department of Revenue, it is collected by the respective county treasurers for the use of the counties. Petitioners Glacier and Pondera Counties have portions of the Blackfeet Reservation within their boundaries.

3 The lessee-producers' portion of the taxes is not challenged in this case. See n.14, infra.

Tribe admits that it has not directly paid any of the taxes, but asserts that the producers have deducted the Tribe's share of taxes from the royalty payments. No producer is a party to this action.

Leasing of the Blackfeet Tribe's oil and gas began in 1932. Between 1935 and 1977, the State collected taxes on all oil and gas production in the State of Montana, including production from Blackfeet leases. The taxes were collected pursuant to the specific taxation authority granted to states by the Indian Mineral Leasing Act of 1924, Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. § 398 (App. 154), [hereinafter the "1924 Act"] on oil and gas production on

"unallotted land"<sup>4</sup> within the Blackfeet Indian Reservation. The question in this case is whether the 1924 Act's taxation authority survived the passage of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (App. 175) [hereinafter the "1938 Act"].

The validity of Montana taxes on oil and gas production of the Blackfeet tribal minerals leased prior to the 1938 Act was upheld by the Montana Supreme Court and this Court in 1936, in

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<sup>4</sup> Although some or all of the Blackfeet leases are for minerals underlying lands that were allotted within the Blackfeet Reservation, all minerals were specifically reserved by Congress to the United States for the benefit of the Tribe, by the terms of the Act of June 30, 1919, 41 Stat. 3, 16, 17, and are therefore "unallotted lands." British-American Oil Producing Co. v. Board of Equalization of Montana, 299 U.S. 159, 163 (1936).

British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), aff'g 101 Mont. 293, 54 P.2d 129 (1936). The complaint in British-American was filed by a producer-lessee, and the Blackfeet Tribe filed a complaint in intervention in the state court proceedings. Montana's gross production and net proceeds taxes at issue in that case were predecessors to the present taxes, and were all assessed against and collected from the producer-lessees, who then could deduct the taxes paid on royalty interests from the royalty payments that were paid to the United States. See British-American Oil Co., supra, 54 P.2d at 131-32.

Since their unsuccessful complaint in intervention in British-American, the Blackfeet Tribe made no other challenge to these taxes until 1976 when the Tribe

filed and later dismissed a case similar to this one, contesting the collection of taxes by Montana and certain counties, as well as the involvement of the Bureau of Indian Affairs.<sup>5</sup> Similarly, no oil and gas producers challenged the taxes. The United States Department of Interior has never challenged the taxes but has consistently recognized the taxes as legitimate. The Department of Interior and the United States Geological Survey, charged with administration of the Tribe's leases and collection of royalty payments, permitted payment of the challenged taxes from the inception of

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<sup>5</sup> Blackfeet Tribe of the Blackfeet Indian Reservation and the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community of the Fort Belknap Indian Reservation v. The Department of Revenue of the State of Montana, et al., No. CV-76-6-GF, U.S. District Court for the District of Montana, Great Falls Division.

oil production until 1977.<sup>6</sup>

In 1938, Congress passed the Indian Mineral Leasing Act of 1938, supra. The 1938 Act changed or did away with various specific provisions of prior Indian mineral leasing acts, and in its last section stated that "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed." Neither the 1938 Act nor any contemporary commentary made any mention of changes or repeals of the tax authorization of the 1924 Act.

In 1977, Leo Krulitz, then Solicitor of the Department of Interior, issued an

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6 This administrative history is documented in a series of memoranda and opinions from the office of the Solicitor of the Department of Interior: 758 Interior Dec. 535 (1943) (App. 232); Memorandum M-36246 (October 29, 1954) (App. 248); Memorandum M-36310 (October 13, 1955) (App. 258); Memorandum M-36345 (May 4, 1956) (App. 262). See part 5, infra.

opinion holding that the 1938 Act "replaced" the 1924 Act, and that the State could not levy its taxes on oil and gas production from leases made under the 1938 Act. 84 Interior Dec. 905 (1977) (App. 267). Shortly thereafter, the Blackfeet Tribe filed the instant action. First Amended Complaint of the Blackfeet Tribe (App. 131).

In the District Court, the Tribe, the State of Montana and the Director of the Montana Department of Revenue, and Pondera County filed motions for summary judgment. United States District Judge Hatfield granted the State's motion for summary judgment, holding that the 1924 Act expressly authorized state taxation of all oil and gas production on unallotted Indian land, and that this express provision authorizing state taxation was not implicitly repealed by

the provisions of the 1938 Act. (App. 103). Judge Hatfield did not rule on the State's alternate ground for summary judgment, that the incidence of all taxes except the Net Proceeds of Royalty Tax was upon the non-Indian oil producers, who were required by Montana's statutes to report and pay all taxes.<sup>7</sup>

The Blackfeet Tribe appealed Judge Hatfield's decision to the Ninth Circuit

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7 The State has never conceded that the tribal royalty was in fact taxed. The Net Proceeds Tax is the only challenged tax in which the producer's interest is mathematically segregated from the royalty owner's interest. The remaining taxes are reported and paid by the producers, and it is not possible for the Montana Department of Revenue to tell from its records what is the arrangement between the producers and the Tribe with respect to proration of the taxes. Montana law permits the producer to pass on a pro rata share of the taxes unless the lease provides otherwise. See, e.g., §§ 15-36-101(3) and 15-38-104, MCA.

Court of Appeals, and on December 14, 1982, a three-judge panel affirmed the District Court's ruling. (App. 70.) The Tribe petitioned for rehearing en banc, which was granted on June 22, 1983, 709 F.2d 521. On rehearing en banc, the Ninth Circuit Court of Appeals held that there had been no repeal of the tax authority in the 1924 Act and that the State continued to have authority to tax

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(Footnote 7 continued)

The collection mechanism between the producers and the Tribe has been varied. See, e.g., 58 Interior Dec. 535 (1943) (App. 232); Memorandum M-36246, October 29, 1954 (App. 248, 251, 257). It is assumed for purposes of this petition that the producer pays the taxes, and either deducts them from the royalty payments or receives a refund from the Department of Interior for the pro rata portion of the tax attributed to the Tribe's royalty. If the State prevails in its argument that the 1924 Act's tax authorization applies to leases made after 1938, all taxes on production will be permissible, including taxes on the Tribe's royalty.

oil and gas production for 1924 Act leases.<sup>8</sup> The en banc panel, however, held that the 1938 Act completely replaced all prior leasing acts, including the 1924 Act, so that royalties from production under all leases made after May 11, 1938 are not subject to Montana's taxes. The court held that the 1938 Act had to be read together with the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-79, (App. 154) [hereinafter "I.R.A."], and that the Act's policy and purposes would not permit state taxation of oil and gas

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<sup>8</sup> The 1924 Act amended the Act of Feb. 28, 1891, 26 Stat. 795, codified at 25 U.S.C. § 397 (App. 150), by extending the term of the leases from ten years to as long as there was production of oil and gas. British-American, supra, held that these Acts should be read together as a whole and that, therefore, the 1924 Act's tax authorization applied to 1891 Act leases. The Ninth Circuit found this "problematic." (App. 13, n.9.)

produced on unallotted Indian lands.

After holding that the state taxes at issue here were not authorized by the 1938 Act for leases entered into pursuant to that Act, the court nonetheless remanded the case to the District Court for a determination of the legal incidence of the State's taxes, and a determination of whether the taxes were preempted, using the analysis required in Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), modified, 665 F.2d 1390 (9th Cir.), cert. denied, 459 U.S. 916 (1982) (App. 51). Three judges dissented from the holding that the 1938 Act "replaced" the 1924 Act.

#### SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals' opinion demonstrates a masterful, but

erroneous, effort to accomplish judicially what Congress did not do--repeal or replace the 1924 Act's express authorization of the State's taxes on production of oil, gas, and other minerals. The 1938 Act was silent on the issue of taxation and contained a general repealer, repealing only "all Act or parts of Acts inconsistent" with the 1938 Act. The legislative history of the 1938 Act made no mention of changing the provision allowing state taxation of production of oil and gas. The Department of Interior, which had supported adoption of both the 1924 and the 1938 Acts, assisted the State in collecting its taxes on all leases for a period of more than 40 years. The court ignored the plain language of the 1924 Act and discredited the administrative history which is compelling evidence of

the continued vitality of the 1924 Act's tax authorization, including leases made pursuant to the 1938 Act.

In holding that the 1938 Act "replaced" but did not repeal the 1924 Act, the court found that the 1924 tax authorization is in force for leases made between 1891 and 1938, but by judicial fiat determined that the otherwise operative tax authority did not affect leases made after May 11, 1938.

The court repudiated applicable canons of construction which, if applied, compel the conclusion that the 1924 Act's tax authorization was not repealed or replaced by the later act which was silent on the issue. The cornerstone of the court's opinion was its conclusion that the 1938 Act must be viewed in light of policies of the 1934 I.R.A. That act, too, was silent on the topic of state

taxation of production of oil and gas owned by Indians. Despite what appears to have been a scholarly examination of the legislative history of the I.R.A., the court was not able to find any evidence in the legislative history directly on the topic of state taxation of production of oil and gas owned by Indians. Nonetheless, the court held that one of the policies of the I.R.A. was that Indians' oil and gas production shall be exempt from state taxation, and that therefore the later 1938 Act "replaced" the 1924 Act's taxation authority. The court thus embarked on the erroneous course of using general policies pertaining to different acts of Congress to rewrite the plain language of statutes and contemporaneous legislative history of the act in question.

The Ninth Circuit's opinion is in conflict with opinions from the Eighth and Tenth Circuits and this Court which have refused to use I.R.A. policies to interpret and repeal the plain language of statutes. The question of the applicability of the 1924 Act's tax authorization to leases made after the 1938 Act is an important one which merits decision by this Court.

#### REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

1. The Issue of the State's Authority to Tax Under the Terms of the 1938 Act Is One of First Impression.

Despite the long-time administrative practice and common understanding allowing Montana to collect its taxes on oil and gas production, the question of

the authority of states to tax mineral production on unallotted lands on Indian reservations under 1938 Act leases is an important one of first impression for this Court. It has never been put before and answered by any courts, to petitioner's knowledge, except for the lower courts in this case, the District Court in Merrion v. Jicarilla Apache Tribe, No. 77-292 (D.N.M. Dec. 29, 1977), rev'd, 617 F.2d 537 (10th Cir. 1980), aff'd, 455 U.S. 130 (1982), and the Arizona Supreme Court in Industrial Uranium Co. v. State Tax Commission, 95 Ariz. 130, 389 P.2d 1013 (1963).<sup>9</sup> The same question was later presented to the Tenth Circuit Court of Appeals by the

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<sup>9</sup> Since the inception of this case, however, numerous other cases have proliferated in Montana and elsewhere. See part 2, infra.

plaintiffs and amicus in Southland Royalty Co. v. Navajo Tribe of Indians, 715 F.2d 486 (10th Cir. 1983). In that case, the producer-lessees challenged the validity of Utah's oil severance tax on oil produced on unallotted Navajo lands. The Tenth Circuit declined to answer this question because it lacked jurisdiction under the provisions of the federal tax anti-injunction act, 28 U.S.C. § 1341.

Since British-American, supra, in 1936, there have been two occasions to petitioners' knowledge when this Court has commented on but did not decide the question of tax authority of states with respect to mineral production on unallotted lands on Indian reservations. The Court mentioned the existence of the state tax authority under the 1924 Indian Mineral Leasing Act in a footnote to McClanahan v. Arizona Tax Commission, 411

U.S. 164, 177 n.16 (1973). While McClanahan did not concern the issue of the power of states to tax production of Indian minerals, and this Court therefore made no decision on that issue, the Court did cite that act in footnote 16 as an example of express congressional authority for state taxation, thus suggesting that states' authorization to tax under the 1924 Act was still valid.<sup>10</sup>

More recently, this Court commented on states' power to tax production of Indian oil and gas in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). That case involved a New Mexico

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<sup>10</sup> Footnote 16 in McClanahan also refers to 18 U.S.C. § 1161 as evidence that "state liquor laws may be applicable within reservations." 411 U.S. at 177 n.16. Last year in Rice v. Rehner, 103 S. Ct. 3291, 3302 (July 1, 1983), this Court found that that reference did in fact indicate the existence of a statute expressly providing for application of state law.

Indian Tribe whose reservation was created by executive order rather than by treaty. The leasing authority for that reservation was set forth in the 1927 Indian Mineral Leasing Act, Act of March 3, 1927, 25 U.S.C. § 398c, which authorized mineral leasing and state taxation of mineral production on executive order reservations. In Merrion, the leases in question were post-1938 Act leases and the non-Indian lessees were being taxed by the State of New Mexico. The Jicarilla Apache Tribe argued to the Tenth Circuit and to this Court that the 1927 Act's taxing authority was inapplicable to leases made pursuant to the 1938 Act. This Court and the Tenth Circuit declined to decide whether New Mexico had taxation authority because the State of New Mexico was not a party in that case. Merrion, 617 F.2d at

547 n.5, 455 U.S. at 151 n.17.<sup>11</sup> Nonetheless this Court's opinion suggested that the state authority to tax may be in effect. For instance, this Court stated that "the mere existence of state authority to tax does not deprive the Indian Tribe of its authority to tax." 455 U.S. at 151. Also, the three dissenting justices in Merrion appeared to think that the purposes of the 1927 Act and the 1938 Act are the same with regard to the authority of the state to tax mineral production. 455 U.S. at 186 n.46. In any event, this Court's attention to this unanswered question certainly highlights the importance of

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<sup>11</sup> The district court opinion in Merrion held that the 1938 Act did give states authority to tax oil and gas produced on tribal lands, rejecting the Jicarilla Apache Tribe's contention that the 1938 Act repealed by implication the express taxation authority of the 1927 Act.

the question and the need for it to be settled now.

2. The Ninth Circuit Opinion Raises Serious and Recurring Problems for Montana and Other States.

In the State of Montana, four producers<sup>12</sup> with leases on the Blackfeet Indian Reservation are now paying their oil and gas production taxes under protest and suing for refunds. Prior to the instant case, the producers paid all of these taxes without challenge, and, at the direction of the Department of Interior, deducted the taxes paid on the Tribe's royalty interests from the royalty payments to the Tribe or received

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<sup>12</sup> Suits for refund have been filed by Blackleaf Petroleum Co., Montana Power Co., Union Oil Company of California, and Murphy Oil Corp. The Blackfeet Tribe is not a party to any of these suits.

credit for taxes paid which were attributable to tribal royalty.<sup>13</sup> The producers have followed their Montana statutory remedies. Since January, 1979, when the first payments under protest began, a total of ninety-six separate actions have been filed in Montana and stayed pending the outcome of this case. More than five million dollars in taxes have been paid under protest.<sup>14</sup>

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13 See n.7, supra.

14 Not all producers are challenging all taxes at issue here. The producers who are challenging various taxes apparently challenge both the producer's share and the share which might be attributed to the royalty interest. Thus, the amount at issue in this case is different from the amounts paid under protest. The Montana Department of Revenue has made a rough estimate of taxes at issue here collected between 1975 and 1982 as follows: Net Proceeds Tax, \$2,314,000.00; Resource Indemnity Trust Tax, \$68,400.00; Severance Tax, \$425,400.00; Board of Oil and Gas Conservation Tax, \$12,700.00.

Resolution of the question of whether the 1924 Act authorizes the State to impose these taxes is appropriate and necessary now. The Ninth Circuit remanded this case to the district court for trial. Trial will not dispose of or affect the outcome of this purely legal question. A ruling on the question now may make trial unnecessary. A ruling now would prevent the likelihood of disparate results in the ninety-six tax refund cases now pending in various Montana courts, with their attendant appeals.

In addition, the Ninth Circuit opinion that production under 1938 Act leases may not be taxed by the states raises serious problems for other states. Numerous cases are pending in state and federal courts in Arizona and New Mexico dealing with that question, and can be determined by this case. In New Mexico,

there are six cases pending before the Santa Fe County District Court whose outcome could be substantially affected by this Court's decision in the present case. Two of these cases challenge various state resource and property taxes on the production of uranium on the Navajo Reservation; two other cases contest the state's power to tax oil and gas production on the Navajo Reservation in light of Navajo taxes; and the last two cases (one of which consists of five consolidated cases) contest the state's taxes on oil and gas production on the Jicarilla Apache Reservation. Currently pending in Arizona state court is a major case in which a coal producer mining coal from the Navajo Reservation is challenging Arizona's taxes on production. At issue are more than \$25,000,000 to date.

This Court's review of the instant case will prevent the likelihood of varying opinions and the repetition of lengthy and costly litigation on the same subject in Montana and elsewhere.

3. Congress' Authorization of State Taxation Under the 1924 Act Is Clear and Remains Intact.

The clear language of the 1924 Act authorized taxation of Indian interests in mineral development, such as rents and royalties, as long as the taxes do not become a lien against the land or other property of the Indians. Unless the provision authorizing state taxation has been repealed, that provision authorizes the State to impose its taxes on oil and gas production on the Blackfeet Indian Reservation. The Ninth Circuit ruled that for all leases entered into since 1938, the taxation provision of the 1924

Act was essentially "replaced" by silence of the 1938 Act, and that the silence, when read together with the policy of the I.R.A., Indian Reorganization Act, amounted to a lack of Congressional authority to tax. "Replacement" is, of course, tantamount to repeal of the 1924 Act's taxation authority.

In order to facilitate adoption of the "replacement" approach, the Ninth Circuit refused to apply customary rules of statutory construction which, if applied, compel the conclusion that the 1924 Act's taxation authority remains in force. The court held that "resort to conventional canons of construction yields inconsistent results," because of the countervailing canon that Indian legislation is "to be construed liberally in [the Indians'] favor." (App. 6, 7 n.3.) As discussed in part 4 infra,

other courts have used canons of construction in Indian cases, contrary to the Ninth Circuit's conclusion that the canons were only guideposts which the court found impossible to apply. (App. 41.)

When two statutes have provisions on the same subject matter, certain rules of statutory construction apply. First, there is a strong presumption against repeals by implication. United States v. Borden Co., 308 U.S. 188, 198 (1939); Frost v. Wenie, 157 U.S. 46, 58 (1895). In United States v. Greathouse, 166 U.S. 601, 605 (1877), the Supreme Court said:

But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and they are not absolutely irreconcilable, effect should be given, if possible, to both of them.

It is also well settled that the courts will not use a strained construction of a

statute in order to find an inconsistency. United States v. Noce, 268 U.S. 613, 619 (1925). Inconsistency is never presumed, and will not be found if any other reasonable construction exists. Frost v. Wenie, 157 U.S. at 58. There is no inconsistency between the express authorization to tax in the 1924 Act and the silence on taxation in the 1938 Act. The taxation authority in the earlier act is intact for leases entered into after the 1938 Act.

Nonetheless, the Ninth Circuit ignored these canons of construction and used a strained reading of the 1938 Act in order to find that Congress' silence on the taxation authority meant that Congress intended there be no taxation. The court then refused to assign any significance to the general repealer provision in the 1938 Act that "All Act

or parts of Acts inconsistent herewith are hereby repealed."

The standard construction of a general clause repealing only "inconsistent acts" is that such a clause is "an express limitation of the repeal to inconsistent acts." 1A C. Sands, Sutherland Statutory Construction § 23.08 at 221 (4th ed. 1972). In Hess v. Reynolds, 113 U.S. 73, 79 (1885), this Court held that such a clause "implies very strongly that there may be acts on the same subject which are not thereby repealed." The inclusion of such a clause in the 1938 Act "indicates plainly the intention of Congress to leave in force some portions of former acts relative to the same subject matter." United States v. Henderson, 78 U.S. (11 Wall.) 652, 656 (1870). To the extent that the repealing clause means anything

at all, it means that the 1938 Act was not intended to be comprehensive to the exclusion of all existing statutes relating to mineral leasing of unallotted Indian lands. Congress well knew how to repeal the taxing provisions contained in the 1924 Act, but did not do so.

Under applicable rules of statutory construction, there is no need to examine the underlying unexpressed intent of Congress in passing the 1938 Act. If that sort of analysis is done, it is significant that although the authority for states to tax was an important feature discussed in passing the 1924 Act (S. Rep. No. 546, 68th Cong., 1st Sess. (1924), App. 322), there was no discussion at all of state taxation in passing the 1938 Act. However, there was testimony itemizing the specific provisions of previous mineral leasing

laws which Congress did want to correct or change. S. Rep. No. 614, 74th Cong., 1st Sess. (1935) (App. 332, 335-41) [hereinafter S. Rep. No. 614]; S. Rep. No. 985, 75th Cong., 1st Sess. (1937) (App. 343, 346-353) [hereinafter S. Rep. 985]; H. Rep. No. 1872, 75th Cong., 3d Sess. (1938) (App. 355) [hereinafter H. Rep. 1872].

The bill that became the 1938 Act was first introduced into Congress in 1934. S. 3565, 73d Cong., 2d Sess. (1934); H.R. 9427, 73d Cong., 2d Sess. (1934). The same bill was introduced in 1935, S. 2638, 74th Cong., 1st Sess. (1935), and was designed to remove Indian mineral leasing from the general mineral laws of the United States, and to give the government and various Indian tribes the authority to refuse mineral leases which they felt were not economically

advantageous to the tribes. The bill was supported by the Department of the Interior, which submitted letters in support of the legislation.<sup>15</sup> The bill was introduced in 1937 as S. 2689 and H.R. 7626. The Department of the Interior submitted substantially the same

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15 S. Rep. No. 614, App. 332, 333 (letter from T. A. Walters, Acting Secretary of the Interior, to Hon. Elmer Thomas, Chairman, Sen. Comm. on Indian Affairs, April 15, 1935). The letter summarized the lack of discretion in the Secretary of the Interior to reject leases of Indian lands under the general mineral statutes, despite the lack of adequate return to the Indians. The letter also stated: "The most urgent change is in the interest of leasing deposits of building stone, sand, gravel, coal, and many other minerals." (App. 339.) The letter concluded: "The attached draft of bill, it is believed, would be a more satisfactory law for the leasing of unallotted Indian land for general mining purposes. It will effect no change in the present law for leasing oil and gas land and will bring all mineral leasing matters in harmony with the Indian Reorganization Act, and I recommend that it be enacted." (Emphasis supplied) (App. 341-42).

letter in support of the legislation as had been sent in 1935.<sup>16</sup> S. 2689 was passed on May 11, 1938. While the Senate version of the final bill contained new language pertaining to posting of surety bonds and delineating the Secretary of the Interior's power over oil and gas mining, the available legislative history does not indicate any erosion of the state's taxing authority pursuant to the 1924 Act.

Nonetheless, as support for its conclusion that the 1924 tax authority was "replaced," the Ninth Circuit cited the letters from the Department of the Interior stating that the 1938 Act would "bring all mineral leasing matters in harmony with the Indian Reorganization

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16 S. Rep. No. 985 (App. 343); H. Rep. No. 1872 (App. 355).

Act." (App. 27) See n.15, supra. The court's use of that broad statement in order to find an implied repeal or replacement of the specific tax authorization provision flies in the face of common standards of statutory construction. Furthermore, as discussed in part 4 below, even if the 1938 Act is read to harmonize with the intent of the I.R.A., the Ninth Circuit Court of Appeals' conclusion is not supportable.

Finally, Congress has indicated several times that the tax authorization expressed in the 1924 Act is still in effect. Recent legislative proposals to limit state severance taxes to a 12.5 percent rate were applied to state severance taxes on coal "mined or produced on Indian lands or lands owned by the Federal Government...." S. 2695, 96th Cong., 2d Sess. (1980); H.R. 6625,

H.R. 6654, and H.R. 7163, 96th Cong., 2d Sess. (1980); S. 1778, 95th Cong., 2d Sess. (1979). Moreover, the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101 et seq., provided in section 6 of the Act, 25 U.S.C. § 2105, that:

Nothing in this chapter shall affect, nor shall any Minerals Agreement approved pursuant to this chapter be subject to or limited by, sections 396a to 396g of this title [the 1938 Indian Mineral Leasing Act], or any other law authorizing the development or disposition of the mineral resources of an Indian or Indian tribe.

(Emphasis supplied.) These subsequent congressional actions show the continued vitality of the 1924 Act's tax authority.

4. The Ninth Circuit Court of Appeals Misconstrued and Misapplied the Policy of the I.R.A. to Excise Judicially State Taxation Authority.

As discussed above, the Ninth Circuit refused to apply standard canons

of statutory construction but decided instead to resort to an analysis of the language, purpose, and historical contents of both the General Allotment Act of February 8, 1887, 24 Stat. 388, codified at 25 U.S.C. §§ 331 to 334, and of the I.R.A. In doing so, the court apparently considered the administrative and legislative histories of the 1924 and 1938 Acts, the specific acts in question, irrelevant. The Ninth Circuit concluded that the 1924 Act reflected Allotment Act policies and programs and that the 1938 Act reflected I.R.A. policies and programs, interpreting the I.R.A. as a "complete about-face, [from the allotment program]...to reverse the effects of 47 years of federal Indian policy." (App. 19-20.)

The court applied its interpretation of the I.R.A. to the 1938 Act because one

stated purpose of the 1938 Act was to "bring all mineral leasing matters in harmony with the [I.R.A.]." (App. 27, citing S. Rep. No. 985, supra, and H. Rep. No. 1872, supra.) In fact, those congressional reports do indicate that this was a purpose of the 1938 Act. (App. 343, 347.) However, the court's construction of the policy and intent of the I.R.A. overriding the tax authority in the 1924 Act is completely unjustified. First, the I.R.A. was not intended to enlarge radically the power of the Indian tribes.<sup>17</sup> Second, there is

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17 The provision now contained in section 16 of the I.R.A. gave to "organized tribes various limited powers, all of which are presently enjoyed by some of the tribes under existing tribal organization." S. Rep. No. 1080, 73d Cong., 2d Sess. at 2 (1934). See also statement of J. Collier, Hearings on S. 2755 and S. 3645, part 2, Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) at 101, saying that there was really nothing new proposed in the legislation.

absolutely nothing in either the I.R.A. itself, or in the legislative history surrounding it, that shows any intent of Congress to override the statutory authorization for state taxation of minerals reserved for the Blackfeet Tribe or any other minerals included in the 1924 Act. Instead, the legislative history demonstrates a contrary intent, so that even if the general I.R.A. policies are used in construing specific earlier and later statutes, that analysis would not result in an end to the State's taxes pursuant to the 1924 Act.

The primary purpose of the I.R.A. was the reversal of the previous policy of allotting parcels of land to Indians under the allotment system. This purpose was to be achieved by preventing further loss of lands and by revesting certain types of land into tribal ownership.

Hearings on S. 2755 and S. 3645, part 2, Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) [hereinafter "I.R.A. Hearings"] at 153.<sup>18</sup> None of the discussion about the lands lost through the allotment system or the lands to be revested in tribes included mineral estates. The reason for this was that mineral deposits were not generally desired for individual allotments. See British-American, supra, 299 U.S. at 164;

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<sup>18</sup> Congress viewed the allotment system as a failure and a disaster accounting for the loss of vast amounts of tribal lands. Testimony and reports submitted during the lengthy committee hearings on the I.R.A. show the reversal of the allotment system to be the primary purpose and objective of the I.R.A. E.g., I.R.A. Hearings at 57, 61, 117, 133-34, 143, 147, 148, 153, 173, 183, 190. This testimony was so extensive that at one point in the Hearings, Senator Wheeler interrupted Commissioner Collier's questions on the failures of the allotment system to say "[W]e know what the situation is...." I.R.A. Hearings at 157.

I.R.A. Hearings at 153. The Blackfeet Tribe's minerals had long before been reserved from allotment or disposition and held for the benefit of the Tribe, Act of June 30, 1919, supra, so that the I.R.A. had no effect on the minerals' status. The desire of Congress to reverse the allotment policy through the I.R.A. did not alter the ownership status of minerals or Congress' earlier authorization to lease these minerals.

The I.R.A. did provide that lands, when revested in a tribe, would then become exempt from state and local taxation, and the tax exempt status of restricted lands was to be continued. I.R.A. § 6 (App. 162). The Ninth Circuit inferred from the commentary on the tax exemption of the vested and restricted lands an intent of Congress embodied in the I.R.A. to exempt all Indian property,

including minerals, from state taxation. The court then concluded that Congress intended to end state taxes authorized by the 1924 Act because, in its opinion, Congress intended in the I.R.A. that Indians become economically independent and self-sufficient.

The Ninth Circuit reached its conclusion without citing any language in the I.R.A. itself or in its legislative history directly supporting its conclusion. None exists. There is nothing in the I.R.A. or its legislative history indicating that the contemplated change in tax status concomitant with a change in ownership status would be extended to minerals whose ownership status was not being changed under the I.R.A. Without question, one I.R.A. purpose was to promote increased tribal autonomy and control over tribal

economics and tribal resources. The means specified by Congress to accomplish the goal of overcoming the Indians' past inability to make effective use of their land and natural resources was the establishment of an Indian credit system and fund. See, e.g., S. Rep. No. 1080 at 3; I.R.A. Hearings at 154, 168. Contrary to the Ninth Circuit's conclusion, the legislative history of the I.R.A. itself reveals no intention by Congress to encourage tribal autonomy by ending state taxation of mineral production on the Blackfeet or any other Indian reservation.

Another indication that the I.R.A. was not intended to override the state's taxation authority in the 1924 Act was the specific recognition by Congress during discussions of the I.R.A. of Congress' "power to subject tribal

property to taxation by local, state, or other authorities." Brief submitted by Commissioner of Indian Affairs Relating to Power of Congress Over Indians, I.R.A. Hearings at 268, 270. See also I.R.A. Hearings at 185.

In S. Rep. No. 1080, the specific purposes of the proposed I.R.A. were itemized in detail. It is significant that none of those purposes dealt in any way with elimination of states' power to tax mineral production on Indian reservations. In contrast to the silence of the legislative history on the states' tax authority over Indian mineral production, there were references to statutes which were outdated in light of new policies. For example, during the Senate committee hearings on the I.R.A., it was acknowledged that the then existing federal Indian liquor laws, 18

U.S.C. §§ 1154 and 1156, prohibiting liquor transactions in "Indian Country" or with Indians, had outlived their purpose and were contrary to common sense and national policy. I.R.A. Hearings at 200. Nonetheless, an explicit repeal by Congress in 1953 was required to nullify the absolute prohibition. 18 U.S.C. § 1161. If clear statements of Congressional policy made during the I.R.A. hearings were sufficient to override existing statutory provisions that were arguably inconsistent with the policy of the I.R.A., Congress' enactment of 18 U.S.C. § 1161 would have been unnecessary and inexplicable.

The Ninth Circuit bolstered its conclusion that the 1938 Act dispensed with state power to tax by misreading the legislative history to the 1924 Act. The court stated that the purpose and

incentive behind the 1924 Act, gleaned from "common themes" of various Congressional pieces of legislation, over a span of seventeen years (App. 15-18),<sup>19</sup> was to encourage non-Indian development and settlement on tribal lands, and that this purpose differed substantially from the purpose and incentive of the 1938 Act, which was to foster tribal autonomy. This perceived purpose and incentive is certainly not expressed in either the language of the 1924 Act or its legislative history. The express intent of the 1924 Act was to allow development of Indian leases, which were not being developed up until that time because of

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<sup>19</sup> Curiously, none of the court's references for this proposition is in the 1924 Act, in the year 1924, or related to Congress' consideration or passage of the 1924 Act.

the ten-year time limitation on leases. Additionally, Congress was concerned that very frequently non-tribal tracts were developed adjacent to the tribal tracts, with the result of "drainage [from the tribal tract] in some instances." The bill was introduced at the request of the Department of Interior to cure that condition. S. 2314, 68th Cong. 1st Sess., Vol. 65 Part 9 Cong. Rec. 8597 (May 15, 1924).

The 1924 Act was enacted to encourage development for the benefit of the Indians. It was specifically stated by Congress that the money would go "into the tribal fund," and that the interest of the Indians would be protected by the Act. Ibid. The bill received a favorable report from the Indian Affairs Committee. Id. at 8710. In answer to a specific question on whether Indians

wanted the law on leasing changed, Senator McKellan answered, "I do not think there is any doubt about it. It has been found absolutely impracticable to handle oil and gas leases under the old mining law, which limited the leases to ten years." S. 2314, 68th Cong., 1st Sess., Vol. 65 Part 6 Cong. Rec. 5492 (Apr. 3, 1924).

The incentive and purpose of the 1924 Act, to have oil and gas on tribal lands developed and get returns for the Indians, is no different from the purpose of the I.R.A. to encourage Indians to become economically independent or the purpose of the 1938 Act, which included giving the Indians "the right to lease more lands so that the Indians can have more income." S. 2638, 74th Cong., 1st Sess., Vol. 79 Part 7 Cong. Rec. 7815 (May 20, 1935). The Ninth Circuit was

wrong in finding that the purposes and policies of the 1924 and the 1938 Acts were so different as to cause the elimination or replacement of the state taxation provision in the 1924 Act.

One post-1938 Act indication that neither Congress nor the Commissioner of Indian Affairs was concerned with eliminating the state's power to tax mineral production under the I.R.A. is a remark of Commissioner Collier on the I.R.A. In an annual report, 1941 Secr. Inter. Annual Report 451, Mr. Collier noted the lack of tribal economic improvement and independence despite the passage of the I.R.A., blaming Congress' refusal to appropriate the authorized funds for the sluggish economic improvement of the Indians. This assessment was made in 1941, when the taxes in question here were being

collected and ~~after~~ the Montana Board of Equalization had been successful in British-American, supra. Surely, if Mr. Collier perceived that these taxes were contrary to the purposes or intent of the I.R.A. or were responsible for the failure of tribes to develop economically, he would have attributed some blame for the failure on these taxes. Yet, in that annual report, the blame for the failure was placed on Congress for its refusal to appropriate authorized funds.

The Ninth Circuit's broad and incorrect construction of the I.R.A. and the application of this construction to the interpretation of the 1938 Act presents a serious federal question requiring review by this Court.

5. The Ninth Circuit Court of Appeals Misconstrued Agency Opinion and Ignored the History of Administrative Practice.

In concluding that the tax authority in the 1924 Act no longer exists, the Ninth Circuit had to overlook, and did in fact ignore,<sup>20</sup> the almost 40 years of consistent practice of authorizing and recognizing the power of the state to collect the taxes in question. The enactment of the 1938 Act had no effect

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<sup>20</sup> The court did not ignore the existence of the various opinions of the Department of the Interior brought to its attention, which, prior to 1977, recognized that the State was collecting all of its oil and gas production in taxes for production on the Blackfeet Reservation, and authorized or acquiesced in that taxation. However, the court considered these to be informal, not necessarily on point, or perhaps wrong, in light of the Department's 1977 opinion in relation to mineral production on the Fort Peck Reservation, Montana.

upon the Department of Interior's interpretation that the 1924 Act's tax authorization continued in effect for post-1938 leases. The taxation did not go unquestioned, as is obvious from the series of memoranda and opinions on the topic. (App. 232-321.) The mechanism for collection of the taxes was troublesome, and the Department as an accommodation to the producers authorized the payment and collection mechanism whereby the producer paid the taxes and reduced the tribe's royalties by the amount of taxes paid on the tribe's royalties. (App. 243, 257.)

This long-standing practice, and the pre-1977 opinions from the Department of Interior, all show that the Department of Interior was aware of the taxation and was aware that some had questions about it, but nonetheless, the Department's

practice was to allow the taxes to be collected. This sort of interpretation by the Department charged with the administration of the 1938 Act must be given consideration and deference by courts. Rice v. Rehner, 103 S. Ct. 3291, 3301 n.13 (1983). Recently, this court in Aluminum Company of America v. Central Lincoln Peoples' Utility District, 52 U.S.L.W. 4719 (U.S. June 5, 1984), reminded us of the substantial deference which is to be given to the interpretation of the agency charged with administration of a statute. This deference should be accorded to the interpretation of the Department of Interior immediately following enactment of the 1938 Act, not the interpretation of 40 years later, because that interpretation represents:

[A] contemporaneous construction of a statute by the men

charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.

Id. at 4719 (Citations omitted).

The Ninth Circuit's failure to consider and defer to the long-time administrative practice of allowing these taxes to be collected from 1938 up until 1977 merits review by this Court.

## II. THE NINTH CIRCUIT'S CONSTRUCTION AND APPLICATION OF THE POLICY AND INTENT OF THE I.R.A. IN ORDER TO DEFEAT A STATUTORY PROVISION CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AND THIS COURT.

After refusing to apply conventional canons of construction, the Ninth Circuit analyzed the policies and intent of the I.R.A. as the backdrop for interpreting the 1938 Act. The court held that one policy of the I.R.A. was to do away with states' power to tax and that this intent

determined the meaning of the tax provision at issue.

This type of analysis has been urged by Indians and Indian Tribes most recently in cases involving rights-of-way over allotted and tribal lands. Tribes have argued that section 16 of the I.R.A. (App. 170-72) requires tribal consent before any rights of way can be acquired. The Eighth and Tenth Circuit Courts of Appeal and this Court, however, have rejected requests to apply the policy and language of section 16 of the I.R.A. in interpreting earlier and later statutes dealing with condemnations of various rights-of-way. No court, except the Ninth Circuit in the instant case, has found it impossible or necessarily leading to inconsistent results to resort to conventional canons of construction

when two statutes on the same subject involve Indians.

In Nebraska Public Power District v. 100.95 Acres of Land in County of Thurston, 719 F.2d 956, 960-61 (8th Cir. 1983), rev'g 540 F. Supp. 592 (D. Neb. 1982), the Eighth Circuit used conventional canons of construction to find that there had been no implied repeal of a 1901 statute allowing condemnation of allotted lands, 25 U.S.C. § 357, despite a 1948 statute, 25<sup>1</sup> U.S.C. §§ 323-28, which conditioned condemnation of a right-of-way across allotted Indian land upon secretarial or individual allottee consent. The Eighth Circuit reversed the district court which held that the I.R.A. policies of encouraging tribal self government and preservation of the Indian land base compelled the conclusion that the later act requiring

consent completely supplanted the earlier Act. Nebraska Public Power District v. 100.95 Acres of Land in County of Thurston, 540 F. Supp. at 597 and 600.

The Tenth Circuit<sup>21</sup> has used standard canons of construction to construe the same two statutes,<sup>22</sup> holding that condemnation of allotted lands without consent is possible under 25 U.S.C. § 357. Yellowfish v. City of Stillwater, 691 F.2d 926, 928-29 (10th Cir. 1982), cert. denied, 51 U.S.L.W. 3828 (U.S. May 17, 1983). That Court also rejected the argument that the policy of the I.R.A. conflicted with and overrode the 1901 condemnation provision. 691 F.2d at

930.<sup>21</sup>

Moreover, this Court has also declined to apply policies of the I.R.A. to override specific statutory provisions involving Indians, reversing recent decisions of the Ninth Circuit. In Escondido Mutual Water Co. v. LaJolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians, 52 U.S.L.W. 4588 (U.S. May 15, 1984), aff'g in part and rev'g in part 692 F.2d 1223 (9th Cir.

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<sup>21</sup> The Ninth Circuit Court of Appeals itself has held with regard to 25 U.S.C. § 357 allowing condemnation that there was no repeal by the later statute requiring consent even though "the United States' policy toward Indians may have shifted away from an assimilationist approach in the years since the allotments were made." Southern California Edison Co. v. Rice, 685 F.2d 354, 356 (9th Cir. 1982), cert. denied, 103 S. Ct. 1497 (1983).

1983), this Court declined to follow the analysis of the Ninth Circuit that the I.R.A. and another earlier Indian statute required that tribal (or band) consent be required before licenses can be issued by the Federal Energy Regulatory Commission on trust lands. Instead, this Court held that "absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive" [citation omitted], and that Congress' clear intent is "to be given effect unless there are clear expressions of legislative intent to the contrary." 52 U.S.L.W. at 4590.

Last year, this Court declined to apply the policy of the I.R.A. to federal Indian liquor statutes, Rice v. Rehner, 103 S. Ct. 3291 (1983), rev'g 678 F.2d 1340 (9th Cir. 1982). Eva Rehner argued the I.R.A. policy should be applied in

order to find that Congress intended that states lack jurisdiction over Indian country liquor licensing and distribution. Respondent's Brief on the Merits at 11, Rice v. Rehner.

The Ninth Circuit's opinion, misapplying I.R.A. policies in order to find a repeal or replacement of a statute affecting Indians, conflicts with the opinions of this Court and of the Eighth and Tenth Circuits. This conflict merits review.

#### CONCLUSION

For all these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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